PS LA 2001/7 - Publication of ATO written binding advice

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ATO Practice Statement Law Administration

PS LA 2001/7

This practice statement has been replaced by PS LA 2008/4

FOI status: may be released

This Practice Statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by ATO officers unless doing so creates unintended consequences. Where this occurs ATO officers must follow their Business Line's escalation process.

SUBJECT: **Publication of ATO written binding advice**

PURPOSE: **To provide guidance on:**

- **the requirement to publish written binding advice;**
- **editing written binding advice for publication; and**
- **the review mechanisms available for taxpayers on versions intended for publication.**

STATEMENT

1. This Law Administration Practice Statement should be read in conjunction with Practice Statements PS LA 2001/4, 2001/5 and 2001/8 and the ATO Advice Manual.

2. To improve integrity, transparency and accountability, the ATO publishes edited versions of all written binding advice provided to taxpayers in the Register of Private Binding Rulings (the Register) on the ATO*assist* website: http://ato.gov.au. Written binding advice is defined as:

   - private rulings (including GST specific private rulings – see Law Administration Practice Statement PS LA 2001/4);
   - administratively binding advice; and
   - advice on the new tax system issued under Law Administration Practice Statement PS LA 2001/4.

3. The ATO publishes edited versions of written binding advice issued in response to applications received after 31 March 2001 (except for GST specific private rulings). The ATO publishes edited versions of GST specific private rulings issued in response to applications received after 30 June 2001.

4. The published edited version must be comprehensible and accurately reflect the written binding advice given. The edited version is to include the Explanation/Reasons for Decision.

5. The text of any written binding advice published in the Register will be edited to remove or replace any information that is likely to enable the identity of any taxpayer or entity to be ascertained or would constitute a breach of confidence.

6. Where all the material facts cannot be set out in the written binding advice, the case officer must include a summary of those facts in the written binding advice. The practice of incorporating supplied documents by reference is not sufficient without such a summary.

Preparing the edited version of a written binding advice

7. In addition to preparing written binding advice to the taxpayer, case officers must also prepare an edited version that is comprehensible, accurately reflects the advice and removes or replaces information that:

   - specifically identifies a taxpayer or any other entity;
   - may enable the identity of a taxpayer or any other entity to be ascertained; or
   - is confidential in nature.

8. In some exceptional cases, it may not be possible to accurately reflect the issues and the decision without identifying the taxpayer or any other entity. In these cases, a summary of the case in general terms must be prepared and this will be the edited version.

9. Attachment A sets out guidelines for editing written binding advice.

10. The case officer must consider all submissions made by the taxpayer about the content of the edited version. Taxpayers may make submissions either at the time they request advice or after receipt of the edited version. They will be given the opportunity to seek a further review if they do not agree with the version that the ATO proposes to publish. The case officer is required to document the reasons for not agreeing with a taxpayer's submissions.

11. The case officer must refer both the original and edited versions of the written binding advice to their authorised approving officer for approval.

12. In approving the issue of the written binding advice and the edited version, each authorised approving officer must ensure that the edited version:

    - has been edited in accordance with this Law Administration Practice Statement; and
    - is comprehensible and accurately reflects the written binding advice.

13. The case officer must ensure that the authorised edited version is sent to the taxpayer for comment **at the same time** as the written binding advice is issued.

Process for comments and review

14. If the taxpayer does not provide comments within 28 days from the issue date of the written binding advice, the edited version will be referred for publication in the Register.

15. If the taxpayer provides comments on the edited version, these will be considered by the Practice Management Unit (PMU). The PMU will apply the guidelines set out in Attachment A in considering such comments and advise the taxpayer of its decision. The PMU must liaise with the case officer and authorised approving officer when considering substantive issues raised by a taxpayer.

16. If a further edited version is prepared, the PMU must send this version to the taxpayer. If the taxpayer does not respond within 28 days from the date of issue of the revised edited version, it will be referred for publication in the Register.

17. If a taxpayer does not agree with the decision of the PMU, the taxpayer may make a written request for a further review of the decision by the ATO within 28 days of the issue of the revised edited version. The ATO will refer the request to the Publication Advisory Committee (PAC) via the PAC Secretariat, located within the Office of the Chief Tax Counsel (OCTC). The PAC Secretariat will ensure that appropriate documentation is referred to the PAC. The PAC will consider the taxpayer's submissions and make recommendations. The PAC will include members from outside the ATO.

18. OCTC will consider the PAC recommendations and make a decision about the form in which the written binding advice will be published. The PAC Secretariat will advise the taxpayer of the decision and the reasons for it and provide the taxpayer with a copy of the version that will be published after 14 days from the issue of the advice. The PAC Secretariat will notify the PMU of the decision and the PMU will then notify the case officer and authorised approving officer.

19. Attachment B describes the process for issue, review and publication of the edited version of written binding advice.

EXPLANATION

20. The Commissioner's general power to administer taxation laws includes the power to publish advice.

21. Taxation laws, including section 16 of the *Income Tax Assessment Act 1936*, impose a number of secrecy obligations on ATO officers that restrict the flow of information. Further obligations to protect the privacy of individual taxpayers are imposed by the *Privacy Act 1988* ('Privacy Act'). With the introduction of a publicly accessible Register containing edited versions of written binding advice, ATO officers must take particular care to ensure that taxpayer information and identity are protected.

22. ATO officers must follow a 3 step approach in performing the editing process. These 3 steps involve the removal or replacement of:

- the primary identifying details of all taxpayers and other entities;
- other information that may enable a taxpayer's or any other entity's identity to be ascertained; and
- other information which may be confidential.

23. The tax effectiveness of arrangements will not, of itself, be accepted as providing a basis for a claim of confidentiality (see, for example, *O'Brien v Komesaroff* (1982) 150 CLR 310) although identifying information and other facts which may enable identification must still be removed or replaced.

24. The Register will provide a public historical record of all edited written binding advice issued by the ATO for reasons of integrity, transparency and accountability. The Register will not be updated to reflect changes in the law, withdrawal of advice or any other changes.

25. The written binding advice provided to a taxpayer will be binding on the Commissioner, either legally or administratively, in accordance with the principles outlined in Law Administration Practice Statement PS LA 2001/4. However, the Commissioner will not be bound by the edited version in relation to any taxpayer.

26. The ATO publishes a separate database that will provide guidance on the ATO's interpretation of the law. These are known as ATO Interpretative Decisions (see Law Administration Practice Statement PS LA 2001/8).

Attachment A: Editing process

1. The overall objective of the editing process is to prepare a version of the written binding advice that accurately reflects that advice and is suitable for publication.

2. Case officers, authorising approving officers and Practice Management Unit (PMU) officers (editing officers) must exercise care in preparing edited versions of written binding advice (edited version).

3. The editing officer must delete any information which might reveal a taxpayer's identity or constitute a breach of confidence where the advice does not turn on that information. Where the advice turns on the information, it must be replaced with more general terms which ensure that the edited version is comprehensible and accurately reflects the written binding advice.

4. Editing officers must remove or replace individual facts that in isolation may not identify the taxpayer but, when combined with other information, may allow the identity of the entity to be ascertained.

5. The examples given below are not intended to be exhaustive.

Step 1: Removing taxpayers' primary identifying details

6. The most common items which must be removed or replaced are ALL references to taxpayers and other entities mentioned in the written binding advice. This requires editing officers to ensure that the edited version does not contain any primary identifying details of a taxpayer or any other entity. Editing officers must remove or replace identifying details such as the following:

    - account numbers with financial institutions (eg credit cards, bank account details);
    - addresses;
    - Australian Business Numbers;
    - dates of birth;
    - employee identification numbers (eg Australian Government Service numbers);
    - licence numbers (driver's, firearms etc);
    - medicare numbers;
    - names of individuals, companies and other entities;
    - contact details (eg telephone numbers, fax numbers, e-mail addresses, etc);
    - signatures; and
    - Tax File Numbers.

7. The following example provides some guidance in editing written binding advice.

    Example 1: *Mr Jones of 45 Ramsey Street, Fitzroy, Victoria, claims a deduction for home to work travel expenses* may become

    The taxpayer claims a deduction for home to work travel expenses

[The taxpayer's name and address is replaced with a general identifier such as "The taxpayer". The edited version still accurately reflects the facts.]

8. Examples of other identifying details which may need to be removed or replaced include:

- description of work;
- identification and reference numbers (eg Administrative Appeals Tribunal reference details); and
- titles and/or position of persons (eg Director, Public Officer, Dr., The Hon.).

9. Editing officers must remove or replace certain personal information which is protected from release under the *Privacy Act 1988* ('Privacy Act'). Personal information is defined in the Privacy Act to mean "information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion."

10. Indicative examples of personal information which may fall under this category include:

- adoption of a child;
- details of a divorce;
- medical treatment;
- political associations; and
- taxpayers engaged in income producing activities which may carry a social stigma.

Step 2: Removing other facts which may enable identification

11. Once editing officers have removed or replaced all of the primary identifying details, they next have to remove or replace other facts which may enable someone reading the published version to ascertain the identity of the taxpayer or any other entity. Editing officers must exercise reasonable care when editing so that an informed person in the industry, occupation or community could not ascertain the identity of the taxpayer or any other entity. Editing officers must therefore consider three questions:

a) Whether a person reading the edited version could identify any taxpayer or any other entity?

b) Whether a knowledgeable person reading the edited version could identify any taxpayer or any other entity?

c) Whether a person within a community (geographic, industry, etc) could identify any taxpayer or any other entity from the information contained in the edited version?

12. Matters to keep in mind when considering these questions include references to:

- associates (eg spouse, ex-spouse, siblings);
- business activity;
- countries, States and Territories;
- dates;
- details of financial transactions or related activities and arrangements (including property transactions and their identifiers);
- foreign and domestic government agencies;
- gender;
- industry specific terms or details;
- matters brought before judicial bodies such as Courts, Tribunals, Commissions, etc;
- matters considered by Committees;
- membership of professional bodies;
- monetary amounts;
- quotes from or references to submissions provided by the taxpayer;
- records such as taxation assessments; or
- types and descriptions of assets and projects.

13. The following examples may assist:

Example 2 *A plumber from Yass claims a deduction for car expenses* may become

A plumber claims a deduction for car expenses.
[The removal of the reference to a specific town or city minimises the potential for the taxpayer's identity to be ascertained and the description accurately reflects the written binding advice.]

Example 3 *A professional female golfer claims depreciation on golf clubs* may become

A professional sportsperson claims depreciation on sporting equipment.
[The removal of the reference to a professional female golfer and its replacement with the general term "professional sportsperson" minimises the potential for the taxpayer's identity to be ascertained. The description of the deduction as depreciation of sporting equipment rather than depreciation on golf clubs further maintains the taxpayer's anonymity whilst accurately describing the question at issue.]

Example 4 *A taxpayer sought a ruling in relation to certain international financing arrangements for the leasing of a Boeing 747-400 aircraft* may become

A taxpayer sought a ruling on a financing arrangement for leasing income-producing equipment.
[If the arrangement was described in the former terms others in the aviation industry would probably be able to identify the taxpayer. So the industry specific term - Boeing 747-400 - was generalised as income producing equipment. Furthermore, the phrase international financing arrangements was described as a financing arrangement to further generalise the transaction. Note, however, that if the international nature of the financing was an important aspect of the arrangement, the reference would need to be maintained.]

Example 5 *A Customs officer sought a ruling about the deductibility of his legal costs associated with the successful defence of a criminal charge of receiving a bribe (in connection with the performance of his duties). The Customs officer has left the Customs Service and now works in another Government Department, but the defence of the charge was necessary for his continued prospects of employment.* This may become

A taxpayer sought a ruling on the deductibility of legal costs associated with the successful defence of a serious criminal charge (in connection with the performance of the taxpayer's duties). The rulee has left the previous employment and now works in other employment but argues that the defence of the charge was necessary to preserve continued prospects of employment.
[By removing and/or generalising the facts relating to the rulee's current and former occupation and the charge that the rulee defended in court, the taxpayer's identity will be protected in the edited version that is published in the Register. At the same time the facts and legal question in the written binding advice are accurately reflected.]

14. Editing in step 2 requires that editing officers, to the best of their knowledge, consider whether a knowledgeable person or a significant section of the community may be able to identify an individual, company or other entity.

Knowledgeable person test

15. Editing officers must consider whether someone with specialised knowledge of a particular industry or occupation would be able to ascertain the identity of a taxpayer or any other entity from the content of the edited version. These knowledgeable persons may include:

- the major participants (including competitors) in an industry;
- those who provide services to or have knowledge of the industry and would have an in-depth knowledge of the operations within that industry (including legal and financial advisers, lawyers, engineers, media commentators, analysts etc); and
- those who have a thorough understanding of a particular occupation, including members of professional bodies, unions, industry associations, chambers of commerce, other business associations, consumer bodies etc.

16. To illustrate the knowledgeable person test, assume that an oil company writes to the ATO outlining a proposal to enter into a transaction involving the purchase and installation of oil refining equipment used in a new refining technique. The relevant knowledgeable persons may include all the oil companies, the manufacturers of the oil refining equipment and potential business and stock market investors. In this case, the editing must be sufficient to prevent the oil companies, the manufacturers of the oil refining equipment and potential investors from ascertaining the identity of the taxpayer or any other entity.

17. However, if the request for written binding advice describes the new refining technique, the knowledgeable person test may be extended to the broader oil industry and oil-reliant industries. In this case, further editing may be required so that it would

not enable the broader oil industry and oil-reliant industries to identify the taxpayer or any other entity.

18. The knowledgeable person test is dependent on the facts of each case and the making of a judgement by editing officers as to whether the facts may possibly allow a knowledgeable person to identify the taxpayer or any other entity.

19. The possibility of a knowledgeable person being able to ascertain the identity of an entity is more likely in complex arrangements or transactions, or where the particular industry is highly specialised.

Significant community test

20. The edited version must be worded in such a way that someone within a significant section of the community (geographic, industry, etc) would not be able to associate an individual, company or other entity with the facts described in the advice.

21. The significant community test does not require specialised knowledge, as in the knowledgeable person test, and may relate to general knowledge that is commonly known within a community. The appropriate community in this test will be determined on the facts of each case.

22. To use the previous illustration in the knowledgeable person test, if the oil company proposes to enter a transaction involving the purchase of land on which to construct the new refinery, the significant community would include those residing or doing business in the vicinity of the land to be purchased. In this example, editing officers must consider whether this broader community would be able to identify the taxpayer or any other entity.

Step 3: removing confidential information

23. The final step in editing is to remove or replace information which is confidential in nature. This is especially important where the information is of commercial value and the breach of confidence may result in either a competitive or financial disadvantage. Information that is within the public domain cannot be confidential in nature, however, this information must be removed or replaced if it could identity the taxpayer or any other entity.

24. Confidential information is information which has:

- the necessary quality of confidence; and
- been given in circumstances where the ATO knew or should have known that it was confidential.

25. Information having a commercial value may include a trade secret (eg a formula used in a business operation or other information concerning aspects of a business) which may provide an advantage over competitors. The presence of information having a commercial value may be indicated by the extent to which a person guards the secrecy of the information, the value that the person or competitors place on the information and the investment undertaken to develop the information.

26. Confidential information can only be published by the ATO with the consent of the taxpayer. If the ATO published the confidential information without consent it may have legal consequences.

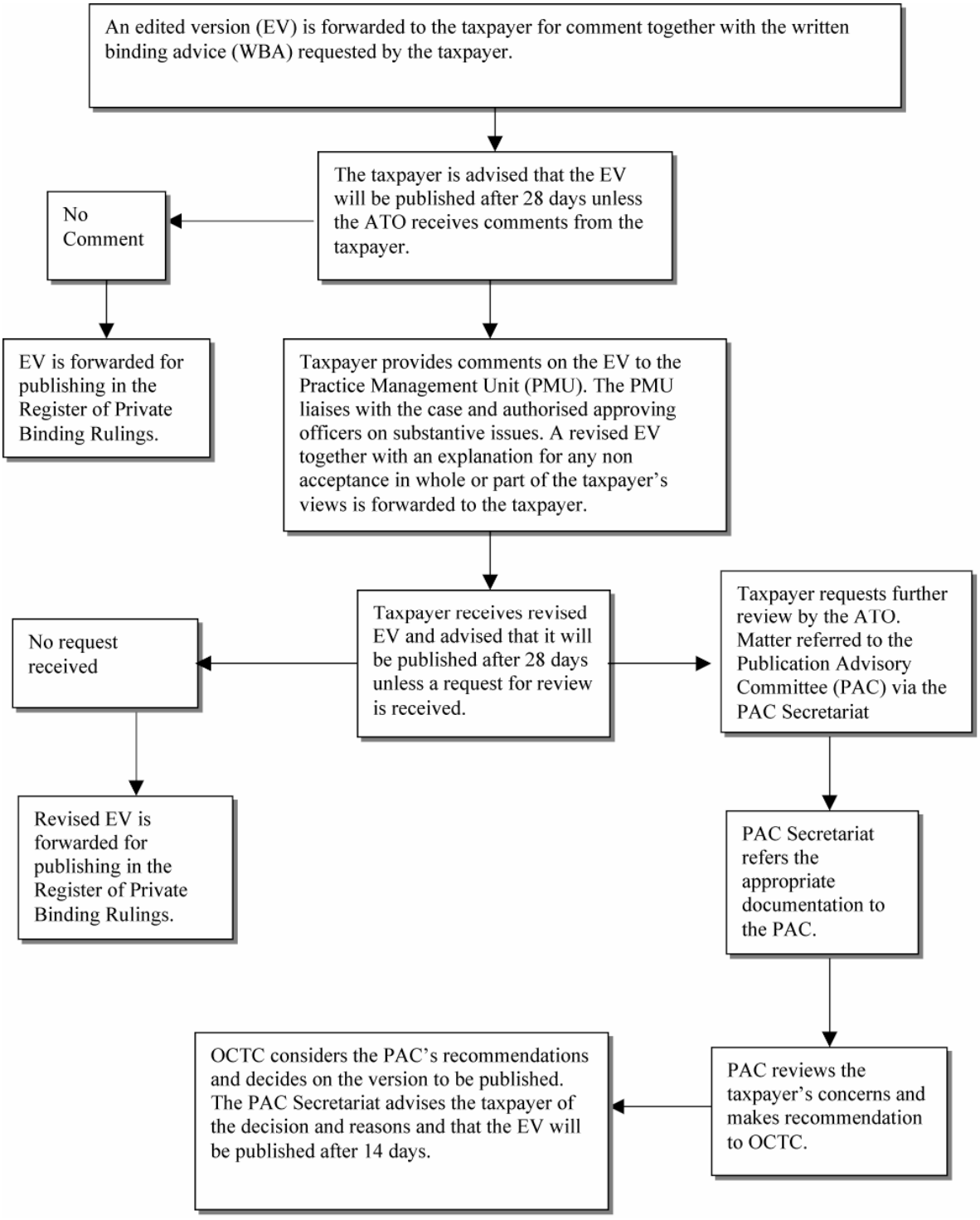
27. Editing officers must seek advice from their PMU where:

- a taxpayer states that information it provides to the ATO is 'in-confidence';
- a taxpayer does not consent to information being published on the basis that it is confidential or of commercial value;
- the information appears to be confidential; and
- the inclusion of the information in the edited version is necessary for it to be a comprehensible and accurate reflection of the written binding advice.

28. Where appropriate, PMU officers should seek advice from the Office of the Chief Tax Counsel regarding such claims of confidentiality.

29. The tax effectiveness of arrangements will not, of itself, be accepted as providing a basis for a claim of confidentiality (see, for example, *O'Brien v Komesaroff* (1982) 150 CLR 310). Such arrangements must be described in the edited version of the written binding advice and must still be edited in accordance with the other requirements of Steps 1 and 2 to protect the identity of the taxpayer(s).

Attachment B: Review process



subject references:	provision of advice; publication of written binding advice; written binding advice
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related practice statements:	PS LA 2001/4; PS LA 2001/5; PS LA 2001/8
case references:	*O'Brien v Komesaroff* (1982) 150 CLR 310
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